



The Indiana Prosecutor

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RECENT DECISIONS

“RIGHT OF ALLOCUTION” EXTENDS TO PROBATION REVOCATION HEARINGS

Vicory v. State
802 N.E.2d 426
(Ind. Sup. Ct. 1/29/04)

I.C. 35-38-1-5 states that before a trial court pronounces sentence, a defendant may make a statement on his own behalf. That statute requires that the sentencing judge ask the defendant if he

wishes to make such a statement prior to the pronouncement of sentence. (This is a defendant's right of allocution.)

Chad Vicory asked permission to read a statement at his probation revocation hearing. The court declined his offer. On appeal, Vicory questioned whether the right of allocution should extend to probation revocation hearings. The Supreme Court held that it should.

The Supreme Court reasoned that because the court in a probation revocation hearing does not “pronounce a sentence”, the judge is not required to ask the defendant whether he wants to make a statement. But, when, as in the Vicory case, the defendant specifically requests the court's permission to make a statement, that request should be granted. The Supreme Court held that the right of allocution should apply in probation revocation hearings.

Nevertheless, because Vicory did in fact testify at his revocation hearing and did not identify on appeal any statement or argument about which he did not testify, the sentencing court's refusal of his request to read his statement did not violate Vicory's substantive rights, the Supreme Court said. The Supreme Court held that reversal was not, therefore, warranted.

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**PHONE CALLS ALONE
SUPPORT STALKING CONVICTION**

***Smith v. State*
802 N.E.2d 948
(Ind. Ct. App. 2/4/04)**

After Kevin Smith was arrested and released on bond on unrelated charges, he left one of the officers who had arrested him eight or nine voice mail messages. The messages included obscenities and threats on the officer's life. Smith identified himself in all but one of the messages. At Smith's trial the officer for whom the messages had been left testified that he feared for his safety and that of his family.

At some point prior to Smith's arrest for stalking, a second officer who had been present at the time Smith was originally arrested told Smith that he could be charged with intimidation and harassment if he did not stop calling the first officer, Smith then began leaving voice mail messages for the second officer. Those messages too contained obscenities and threats.

Smith was convicted of stalking. His stalking convictions were based on the voice mail messages left for the two police officers. Smith asserted on appeal that telephone communications, without more, could not amount to either the "impermissible contact" or "harassment" required by the stalking statute. In that Indiana courts had not previously addressed this issue, the Court of Appeals sought guidance from other jurisdictions. Those decisions, they found, consistently held that a stalking conviction may be supported by evidence of telephone calls alone. The Court of Appeals held in *Smith* that telephone messages, without more, may amount to "impermissible contact" sufficient to support a stalking conviction.

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**NOT A FOREIGN OBJECT
IN THE MOUTH**

***State v. Molnar*
____ N.E.2d ____**

(Ind. Ct. App. 2/13/04)

After Joseph Molnar was charged with operating while intoxicated, he filed a motion to suppress his breath test results. That motion was based upon the premise that his breath test was not properly administered because Molnar had tobacco residue in his mouth at the time of the test. The trial court granted Molnar's motion to suppress and the State sought interlocutory appeal. Molnar argued on appeal that breath test results are admissible only when the test operator and the test equipment have been certified by the Department of Toxicology and the test operator follows test techniques approved by the Department. Molnar argued that failure to follow the approved techniques renders a breath test result inadmissible and that the breath test operator in his case had not followed those approved techniques.

The Court of Appeals agreed with the defendant that the State bears the burden of establishing the foundation for admission of breath test results. To meet this burden the State must set forth the Department approved procedure for the administration of a breath test and then show that the breath test operator in the particular case followed that procedure, the Court said. The procedure for administering a breath test as promulgated by the Department of Toxicology in the Indiana Administrative Code states that, "The person to be tested must have nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, and must not smoke within 20 minutes of the time a breath sample is taken."

The State argued that contrary to the trial court's ruling, this regulation does not require that one's mouth be free from foreign substances. It only requires, the State argued, that no foreign substance be placed in the mouth for 20 minutes prior to the administration of the breath test. The Court of Appeals agreed.

At Molnar's suppression hearing the breath test operator testified as to his training and certification as an operator and the procedure

utilized in administering Molnar's breath test. After Molnar removed the tobacco he had in his mouth at the request of the breath test operator the operator testified, he asked Molnar if he had any foreign substances in his mouth. Molnar replied that he did not. The officer also looked into the defendant's mouth and saw no foreign object there. Further, the operator testified, Molnar did not place any foreign substance in his mouth between that point and the point at which the test was administered at least 20 minutes later. The

Court of Appeals held that the evidence presented sufficiently established that Molnar's test was properly administered. The Court of Appeals concluded that the trial court had abused its discretion in suppressing Molnar's breath test results and the trial court's ruling on the defendant's motion to suppress was reversed.

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